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In the Supreme Court of the United States

RICKEY CLARK,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with a national membership of over 11,500 attorneys and more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL seeks to foster the integrity, independence, and expertise of the criminal defense profession; to promote the fair administration of criminal justice; and to sustain the sanctity of the American system of justice through adherence to the Bill of Rights.

In pursuit of those ends, NACDL actively participates in cases addressing the constitutional implications of criminal punishment. NACDL served as *amicus curiae* in the watershed *Apprendi* case, as well as several follow-on matters. See, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000) (brief filed Jan. 13, 2000); *Harris* v. *United States*, 536 U.S. 545 (2002) (brief filed Jan. 23, 2002); *Cunningham* v.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties have consented to the filing of this brief.

California, 549 U.S. 270 (2007) (brief filed May 8, 2006). It frequently appears as *amicus curiae* on a variety of issues related to sentencing under Section 841 and other statutes. See, *e.g.*, *Burgess* v. *United States*, 128 S. Ct. 1572 (2008) (brief filed Jan. 29, 2008); *Greenlaw* v. *United States*, 128 S. Ct. 2559 (2008) (brief filed Feb. 21, 2008). Its views have repeatedly informed members of the Court. See, *e.g.*, *Kennedy* v. *Louisiana*, 128 S. Ct. 2641, 2663 (2008) (citing NACDL brief); *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 344 n.3 (2006) (same).

Rickey Clark's petition raises several critical issues that have produced considerable confusion in the lower courts. NACDL believes the Court should grant the petition and resolve these quandaries in order to ensure that criminal defendants are treated fairly and uniformly regardless of the circuit in which they face prosecution. The status quo, which lacks fairness, uniformity, or clarity, should not remain.

INTRODUCTION AND SUMMARY OF ARGUMENT

Clark's petition raises timely and important issues at the intersection of the Controlled Substances Act (21 U.S.C. § 841) and *Apprendi*.

Section 841 is a key vehicle for narcotics prosecutions. It prohibits the manufacture and distribution of controlled substances (§ 841(a)) and establishes escalating punishment ranges for violations of the statute (§ 841(b)). In part, Section 841 describes an "aggravated crime": it defines a substantive prohibition "and then provides for increasing the punishment of that crime upon a finding of some aggravat-

ing fact." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

One such aggravating fact under Section 841 is drug quantity; indeed, "[t]he drug quantity determination is critical to the statutory sentencing provisions in 21 U.S.C. § 841." *United States* v. *Doggett*, 230 F.3d 160, 164 (5th Cir. 2000). The statute describes sentencing ranges that fall into three categories. Subsection (b)(1)(A), applicable to the highest quantities, imposes the most severe sentences, while subsection (b)(1)(B) establishes lower ranges for lesser quantities. Subsection (b)(1)(C) provides ranges for undetermined amounts; if the government does not prove quantity, (b)(1)(C) is the default. Some categories feature floors and ceilings; a quantity triggering (b)(1)(A), for instance, mandates (at least) a 10-year minimum, with no maximum, while an indeterminate quantity caps the maximum sentence at 20 years, with no minimum.

These mandatory minimums and statutory maximums implicate the *Apprendi* doctrine. *Apprendi* established that it is "'unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" 530 U.S. at 489. Thus, "any fact that exposes a defendant to a greater potential sentence" must be pleaded in the indictment, presented to the jury, not a judge, and established beyond a reasonable doubt, rather than merely satisfying the preponderance standard. *Cunningham* v. *California*, 549 U.S. 270, 281 (2007).[2]

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[2] In this case, the guilty plea may (or may not) have constituted a waiver of the right to a jury determination, but it would not

The role of *Apprendi* in Section 841 prosecutions has produced a deep circuit split. The central divide is whether drug quantity must be included in the indictment and proven to a jury beyond a reasonable doubt when that fact determines the sentencing range to which a defendant is subject and, by virtue of a mandatory minimum, increases the actual sentence. The lower court's decision sits on one side of a seemingly unbridgeable divide: it held that *Apprendi* requires drug quantity to be proven beyond a reasonable doubt only if the defendant is sentenced to greater punishment than the statutory maximum for an undetermined quantity (20 years), regardless of whether the finding compels the court to impose a mandatory minimum that exceeds the sentence it would otherwise impose. Other courts, however, require drug quantity to be proven beyond a reasonable doubt before the defendant may be subjected to a mandatory minimum sentence based on quantity. Looming over this disagreement is the uncertainty surrounding the meaning of the Court's fractured decision in *Harris* v. *United States*, 536 U.S. 545 (2002), as well as *Harris's* continued vitality in light of subsequent *Apprendi* cases such as *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005).

Review is necessary because only this Court can resolve these important questions and clarify its ruling in *Harris*. The issues are exceptionally important because they affect many of the massive number of prosecutions under Section 841. They further merit the Court's attention because the lack of uniformity produces dramatic inequalities. For in-

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have altered the right to application of the reasonable doubt standard.

stance, a New York defendant in Clark's situation would have received a term of only 4 years, whereas Clark received a term of 10 years. Juries, which are perfectly capable of making factual determinations of drug quantity, should be entrusted with that task. Indeed, the constitutional imperatives of a right to a jury trial and to the protections inhering in the reasonable doubt standard demand it.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFUSION CLOUDING THIS AREA OF LAW.

The deep division among lower courts over the application of Section 841 (and other statutes featuring escalating ranges) merits this Court's attention. The lower courts cannot agree about the burden of proof imposed on the prosecution when a drug quantity finding would increase the punishment range by imposing an otherwise inapplicable mandatory minimum sentence. Intractably divergent answers to this question—overlaid by confusion about the meaning and vitality of *Harris*—have created an unfortunate knot that only this Court can untangle.

A. Courts Disagree About The Proper Burden Of Proof For Drug Quantity.

The requirements for establishing drug quantity vary by circuit on the basis of timing—when the *Apprendi* right attaches. Under the Second and Ninth Circuit view, drug quantity "must always be pleaded and provided to a jury or admitted by a defendant." *United States* v. *Gonzalez*, 420 F.3d 111, 131 (2d Cir. 2005); *United States* v. *Velasco-Heredia*, 319 F.3d 1080, 1085 (9th Cir. 2003). Regardless whether the actual sentence given exceeds the statutory maxi-

mum for unquantified amounts, these circuits do not allow a quantity-based sentence to be imposed without the *Apprendi* protections. *United States* v. *Thomas*, 274 F.3d 655, 663 (2d Cir. 2003) (en banc).

Under the contrary Seventh Circuit view, the status of drug quantity is not determined until *after* sentencing. Thus, *Apprendi* requires quantity to "be treated as an element" subject to *Apprendi* protections "only when it results in a sentence beyond the relevant statutory maximum." *United States* v. *Barbosa*, 271 F.3d 438, 457 (3d Cir. 2001); *United States* v. *Stark*, 499 F.3d 72, 80 (1st Cir. 2007) (drug quantity does not implicate *Apprendi* protections unless it "increase[s] the defendant's sentence beyond the applicable maximum penalty"). Whether a sentence is greater than the default maximum in (b)(1)(C) naturally cannot be known until after a sentence has been rendered.

The lower courts have also viewed their disagreement in terms of the possible sentencing ranges a defendant faces—in essence, whether a drug quantity finding subjects a defendant to a statutorily mandated minimum. The Second and the Ninth Circuits have held that drug quantity must be proven beyond a reasonable doubt because it may increase "a defendant's authorized sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime." *Gonzalez*, 420 F.3d at 126; *Velasco-Heredia*, 319 F.3d at 1085 (a drug quantity finding that raises the range of minimum and maximum sentences triggers *Apprendi*).

The Seventh Circuit and other courts have adopted a contrary position. If the "the actual sentence imposed is less severe than the statutory maximum," *Apprendi* is not implicated. *United*

States v. *Williams*, 238 F.3d 871, 877 (7th Cir. 2001). So long as the resulting sentence does not exceed the default statutory maximum of 20 years, drug quantity "need not be alleged in the indictment and proved to a jury beyond a reasonable doubt." *United States* v. *Keith*, 230 F.3d 784, 787 (5th Cir. 2000) (per curiam). Thus, even if a drug quantity finding subjects the defendant to subsection (A) and increases the sentencing floor to 10 years—as it did for Clark—*Apprendi* plays no role because the resulting sentence falls below the 20-year ceiling of subsection (C).

Whichever rationale is most sound, it is undeniable that this issue recurs with great frequency and affects the sentences of many defendants, with dramatically different results depending only on the location of the prosecution. See Section II, *infra*. Moreover, the difference of opinion between the lower courts has become entrenched. Compare *United States* v. *Confredo*, 528 F.3d 143, 153 (2d Cir. 2008), and *United States* v. *Hollis*, 490 F.3d 1149, 1155 & n.3 (9th Cir. 2007) with *United States* v. *Price*, 516 F.3d 597, 605 (7th Cir. 2008); *United States* v. *Webb*, 545 F.3d 673, 677 (8th Cir. 2008); *United States* v. *Williams*, 464 F.3d 443, 449 (3d Cir. 2006). Only this Court's intervention can bring about needed uniformity.

B. The Split In The Lower Courts Squarely Implicates Lingering Confusion About The Meaning And Vitality Of *Harris*.

At the heart of the division described above is this Court's fractured decision in *Harris*. The uncertainty sparked by *Harris* about the constitutional differences, if any, between increased maximums and statutorily imposed minimums has largely driven the disarray in the lower courts. Rickey Clark's petition

presents the Court with an appropriate vehicle to resolve the uncertainty about whether *Apprendi* precludes the application of a preponderance of the evidence standard when it results in the imposition of a mandatory minimum.

Harris addressed 18 U.S.C. § 924, the federal firearm statute. The text and structure of the statute imposed escalating mandatory minimums depending on how a defendant possessed or used a firearm during a crime. *Harris*, 536 U.S. at 550-551. The Court addressed whether *Apprendi* applied to the aggravating factor, *i.e.*, whether the bundle of Fifth and Sixth Amendment rights governed the prosecution's effort to impose a higher mandatory minimum through a showing of brandishment or use of a firearm (or another aggravating factor). *Id.* at 556-566. While the Court held that Harris was not entitled to the benefit of a reasonable doubt determination by a jury, a majority of the Justices were of the view that there was no logical distinction under *Apprendi* between facts giving rise to a mandatory minimum sentence and those exposing the defendant to a higher maximum sentence. *Id.* at 550-551.

The *Harris* plurality concluded that "a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)" was not an element, and thus *Apprendi* did not apply. 536 U.S. at 557. This view rested primarily on the Court's earlier holding in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), which "sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm." *Harris*, 536 U.S. at 550. The plurality rejected the

notion that *Apprendi* had undermined *McMillan*. *Id.* at 565-567.

Justice Breyer joined in the Court's judgment, but only because he adhered to his underlying disagreement with *Apprendi*. *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). Nonetheless, he could not "easily distinguish *Apprendi* * * * from this case in terms of logic" and did not "agree with the plurality's opinion insofar as it finds such a distinction." *Ibid.*[3]

The four dissenting Justices likewise and emphatically could not identify any constitutionally significant difference between findings that increased minimums and findings that increased maximums. They explained that "[t]he principles upon which [*Apprendi*] relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum," because "[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). Based on their under-

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[3] Justice Breyer foreshadowed this view years earlier. In *Apprendi*, he explained that "as a practical matter," a mandatory minimum "is far more important to an actual defendant," because while a judge can "select any sentence below a statute's maximum," he or she is bound by a statutory minimum. 530 U.S. at 563 (Breyer, J., dissenting). Thus, "all the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum, apply *a fortiori* to any matter that would increase a statutory minimum." *Ibid.*; see also Kevin R. Reitz, *The New Sentencing Conundrum*, 105 COLUM. L. REV. 1082, 1097 (2005) ("A mandatory minimum sentencing rule carries far greater significance for the actual punishment in most cases than the positioning of a theoretical maximum penalty.").

standing that *Apprendi* imposed constitutional limitations whenever "a particular fact shall give rise both to a special stigma and to a special punishment" (*Harris*, 536 U.S. at 575 (internal quotation marks omitted)), the dissenters concluded that the "fine distinctions" between facts increasing the statutory maximum and facts imposing a mandatory minimum "cannot withstand close scrutiny." *Id.* at 574.

The four dissenters also concluded that *McMillan* failed "to withstand the logic of *Apprendi*." *Harris*, 536 U.S. at 580. As they explained, *McMillan* directly contravened *Apprendi*, which focused on "any fact that increases or alters *the range* of penalties to which a defendant is exposed—which, by definition, must include increases or alterations to either the minimum or maximum penalties." *Id.* at 582. The dissent pointed to Justice Breyer's concurrence as further support for "the essential incompatibility of *Apprendi* and *McMillan*," noting that his view left "only a minority of the Court embracing the distinction" between the two cases. *Id.* at 583.

Perhaps understandably, the lower courts have not spoken in one voice when it comes to *Harris*. Whether *Harris* applies to defendants like Clark has become yet another point of division. The Second and Ninth Circuits have ruled that *Harris* does not apply where "drug quantity raises a mandatory minimum sentence" and "simultaneously raises a corresponding maximum, thereby increasing a defendant's authorized sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime." *Gonzalez*, 420 F.3d at 126; see also *Velasco-Heredia*, 319 F.3d at 1085 (*Harris* is inapplicable because "the defendant was never *exposed* to a greater maximum sentence").

Other courts apply *Harris* to permit judicial findings of drug quantity if the resulting sentence "does not exceed the statutory maximum" under § 841(b)(1)(C). *United States* v. *Gonzalez*, 501 F.3d 630, 643 (6th Cir. 2007). Thus, courts differ over whether *Harris* even controls when a finding of drug quantity increases the statutory sentencing range.

This disagreement aside, six years of subsequent case law have called *Harris*'s vitality into question. *Apprendi* started with the holding that facts increasing a statutory maximum implicate the Sixth Amendment (*Apprendi*, 530 U.S. at 484), but the Court has subsequently applied the doctrine to "all the facts 'which the law makes essential to the punishment.'" *Blakely*, 542 U.S. at 304.

It is especially doubtful that *Harris* has survived *Booker*, particularly as applied to a defendant in Clark's shoes. In *Booker*, a drug quantity finding (under Section 841) increased the defendant's sentence from 21 years to a mandatory minimum of 30 years, just as the district court's finding here increased Clark's sentence from 4 years to a mandatory minimum of 10 years. *Id.* at 235. The Court held that *Apprendi* required a jury to make such a finding beyond a reasonable doubt. *Id.* at 235-237. The facts of *Booker* are functionally indistinguishable from those here—in both, a defendant was subjected to a mandatory minimum by virtue of a judge finding drug quantity by a preponderance of the evidence—and the result in both should be the same. Cf. *Cunningham*, 549 U.S. at 293 (striking down, by a 6-3 vote, a California sentencing scheme that permitted a sentence to increase from a "middle term" of 12 years to an "upper term" of 16 years based on

facts proven to a judge only by a preponderance of the evidence).

Observers of the Court have confirmed what five Justices noted in *Harris*: the Court's opinions have yet to offer a principled distinction between maximums and minimums. At least five circuits courts and a welter of academic commentary question whether *Harris* survived recent decisions like *Blakely*, *Booker*, and *Cunningham*. Pet. 26-28 & nn.6-7. Indeed, some have noted that those decisions "have eroded *McMillan* and *Harris* to such an extent that they are dubious at best and, more likely, no longer good law." Kirk J. Henderson, *Mandatory Minimum Sentences and the Jury*, 33 U. DAYTON L. REV. 37, 56 (2007).

There can be no doubt, in the wake of *Blakely* and *Booker*, that *Apprendi* is here to stay. At least five members of the Court believe that under *Apprendi*, there is no logical way to differentiate subjection to a higher minimum and exposure to a higher maximum. The continued refusal to apply *Apprendi* in this context simply makes no sense. As the Court ruled in *Blakely*, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals.'" 542 U.S. at 301. It is unclear why a finding of drug quantity that exposed Clark to an otherwise inapplicable minimum sentence should be treated any differently.

* * *

What is perfectly clear in any event is that the issues raised in the petition have engendered intractable controversy in the lower courts. The recurring nature of the issue, its practical importance, and the

depth of the division among the lower courts makes review appropriate at this time and in this case. Clark's experience crystallizes the key issue: the lower court sentenced Clark to a 10-year sentence pursuant to (b)(1)(A), instead of its preferred 4-year sentence, based on facts that satisfied the preponderance standard, but not the reasonable doubt standard. It is hard to imagine a more perfect vehicle to remedy the troublesome consequences of the discord among the lower courts.

II. THE DISORDER IN THE COURTS HARMS THE CRIMINAL JUSTICE SYSTEM.

The issues discussed above are exceptionally important in part because of the sheer number of people affected: prosecutions and sentences for drugs crimes, many of which involve imposition of mandatory minimum sentences, affect tens of thousands of criminal defendants every year. The lack of clarity about the governing rules creates unfair disparities for criminal defendants.

A. Drug Crime Prosecutions Dominate The Criminal Justice System.

Apprendi issues related to drug crimes affect a staggering number of people. In the year ending June 2007, the federal government commenced almost 19,000 cases charging drug offenses. Administrative Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary 2007*, Table D-2 (Jun. 30, 2007), *available at* http://www.uscourts.gov/stats/june07/D02CJun07. pdf. Drug offenders accounted for more than 25,000 of the 72,865 defendants sentenced in 2007, fully 34 percent of all federal criminal cases and nearly 45 percent more sentences than the next closest category. United States Sentencing

Comm'n, *Sourcebook of Federal Sentencing Statistics*, Figure A (2007), *available at* http://www.ussc.gov/ANNRPT/2007/FigA.pdf. ("Sentencing Sourcebook"); *id.* at Table 3, *available at* http://www.ussc.gov/ANNRPT/2007/Table3.pdf.

The imposition of mandatory minimums is a constant in sentences for drug crimes. Approximately 70 percent of drug convictions result in the application of mandatory minimum sentences. Sentencing Sourcebook, Table 43, available *at* http://www.ussc.gov/ANNRPT/2007/Table43.pdf. In 2007 alone, just over 7,000 five-year and nearly 10,000 ten-year mandatory minimum sentences were meted out. *Ibid.* The imposition of mandatory minimums undoubtedly raises the average sentence for drug trafficking crimes, which is 83.2 months (nearly seven years). *Id.* at Table 13, available *at* http://www.ussc.gov/ANNRPT/2007/Table13.pdf. In short, the issues in Clark's petition affect the trials and sentences of thousands of criminal defendants in the federal courts, directly impacting their lives and the lives of their families.

B. The Lack Of Uniformity Is Problematic On A Systemic And Individual Level.

The division of views among the lower courts creates unfortunate disparities that justify review. Under the status quo, a defendant in Albany or Seattle is bound by a different set of rules from one in Chicago or El Paso. Whereas the prosecution in the Second or Ninth Circuit will have to plead drug quantity in the indictment and prove it to the jury beyond a reasonable doubt in order to secure a sentence under subsection (A), the prosecution in other circuits may omit quantity from the indictment and

prove it to a judge under a preponderance standard. See *supra* Section I.

In the past, the Court has granted review to resolve sentencing conflicts between the circuits. *Castillo* v. *White*, 530 U.S. 120, 123-24 (2000); *Edwards* v. *United States*, 523 U.S. 511, 513 (1998); *Witte* v. *United States*, 515 U.S. 389, 395 (1995). The desire to address such differences reflects the "fundamental principle" of the Constitution "that a single sovereign's law should be applied equally to all." Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1985). That principle requires "uniformity of decisions throughout the whole United States, upon all subjects within [its] purview." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

In the "federal criminal law" context, there is an imperative "for uniformity and consistency." *Tafflin* v. *Levitt*, 493 U.S. 455, 464-465 (1990) (internal citations omitted). The absence of uniformity creates an "unfortunate disparity in the treatment of similarly situated defendants," which "'hardly comports with the ideal of administration of justice with an even hand.'" *Teague* v. *Lane*, 489 U.S. 288, 305, 315 (1989), quoting *Hankerson* v. *North Carolina*, 432 U.S. 233, 247 (1977). In words that resonate strongly here, Justice White explained:

> The statute at issue defines a federal crime, and it should be applied uniformly throughout the United States. Yet, because of conflicting interpretations, defendants in some parts of this country may be punished for violations without proof or pleading of an element required in another judicial circuit. Criminal culpability for violation of federal

> statutes should turn on uniform law, not geography.

Wilkes v. *United States*, 469 U.S. 964, 965 (1984) (White, J., dissenting from denial of certiorari).

The disparity here is profound. Clark's sentence jumped from 4 years to the mandatory minimum of 10 years based on shaky evidence that was not "sufficient to sustain a decision beyond a reasonable doubt." Pet. App. 24a. It should be unsettling that Clark will have to wait six more years "to resume the positive aspects of his past life" on the basis of the murky testimony of a convicted drug dealer whose memory of the quantities involved was not, in the district court's view, "good enough to send somebody away for." Pet. App. 4a.

It should be equally alarming that this result is a function of nothing more than location. Had Clark been prosecuted in New York or Los Angeles, the mandatory minimum would not have applied because the government failed to plead and prove drug quantity beyond a reasonable doubt. *Gonzalez*, 420 F.3d at 115. A judge sitting in the Southern District of New York or Central District of California would not have been obligated by Section 841 to sentence Clark to a 10-year sentence.

While the difference for Clark is measured in years, the disparity may be measured in decades in other situations. Had Clark been previously convicted of a felony drug crime, the drug quantity finding would have doubled the minimum sentence (to 20 years). Yet, a similarly situated Ninth Circuit defendant would not be subject to any minimum sentence. Compare 21 U.S.C. § 841(b)(1)(A)(viii) with *id.* § 841(b)(1)(C).

These differentials are entirely real. In *Gonzalez*, drug quantity was proven by a preponderance of the evidence, but not beyond a reasonable doubt. 420 F.3d at 118. The defendant had a prior conviction, and thus would have been subject to a 20-year minimum. *Id.* at 131. Because the defendant committed his crime in New York instead of Chicago, however, he was subject to no mandatory minimum.

Similarly, in *Velasco-Heredia*, the district court found, by a preponderance of evidence, a drug quantity of 285 kilograms of marijuana even though the government had proven a quantity of only 18 kilograms beyond a reasonable doubt. 319 F.3d at 1083-1084. The Ninth Circuit held that the defendant accordingly could not be sentenced to more than five years without violating *Apprendi*. *Id.* at 1085. By contrast, in the Seventh Circuit, a defendant in identical circumstances could not serve *less* than five years.[4]

Such disparities should be intolerable. They offend the uniformity that anchors the criminal justice system. *Tafflin*, 493 U.S. at 464-465. And they con-

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[4] As *Velasco-Heredia* demonstrates, sentences involving marijuana, which account for 25 percent of all drug sentences (Sentencing Sourcebook, Table 43), present stark disparities. Assume the government can prove beyond a reasonable doubt that the crime involved 50 kilograms of marijuana, but only by a preponderance of the evidence that the crime involved 1,000 kilograms of marijuana. A Chicago federal court will have to impose a 10-year sentence, but a Los Angeles federal court cannot impose a sentence of more than 5 years. Compare 21 U.S.C. § 841(b)(1)(A)(viii) with *id.* at § 841(b)(1)(D). The accident of geography thus results in identical evidence producing a *minimum* sentence in Chicago that is *twice* the maximum sentence in Los Angeles.

travene the principles of fairness that even *Apprendi*'s detractors realize lie at the intersection of the Fifth and Sixth Amendments. *Blakely*, 542 U.S. at 345-346 (Breyer, J., dissenting). Review is needed to eliminate these disparities that bedevil the application of Section 841.

III. JURIES ARE WELL-EQUIPPED TO MAKE FINDINGS REGARDING DRUG QUANTITY.

Leaving the determination of drug quantity in the capable hands of juries is both constitutionally mandated and pragmatically preferable. The basis of *Apprendi* is "the need to give intelligible content to the right of jury trial." *Blakely*, 542 U.S. at 305. That right, this Court has held, "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Id.* at 305-306. It ensures the people's "control in the judiciary," and *Apprendi* bolsters this balance of power "by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." *Id.* at 306. The Seventh Circuit's rule, however, removes drug quantity from the jury, stripping it of its reasonable doubt safeguard, and places the determination in the hands of a judge, under a less stringent standard.

While the jury trial right "does not turn on the relative rationality, fairness, or efficiency of potential factfinders," *Ring* v. *Arizona*, 536 U.S. 584, 607 (2002), the lower court's rule ignores that juries are particularly capable of deciding a question like drug quantity. In many instances, a drug quantity determination will come down to witness credibility; in the absence of seized drugs that can be weighed, the government may often have to prove quantity by calling witnesses to testify about how much of the drug the defendant bought or sold. For Clark, the

credibility of a single witness meant the difference between a 4-year sentence and a 10-year sentence. While the district court did not believe the testimony was sufficient to "sustain a decision beyond a reasonable doubt," it held that the testimony satisfied a more-likely-than-not threshold. Pet. App. 24a.

A jury is well-equipped to rule upon a quantity witness's credibility. Indeed, such determinations are in its wheelhouse: the jury has a "core function of making credibility determinations in criminal trials." *United States* v. *Scheffer*, 523 U.S. 303, 312-13 (1998). "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector,'" proficient at "[d]etermining the weight and credibility of witness testimony" because of its "'practical knowledge'" of people. *Id.* at 313; cf. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("credibility determinations * * * 'are jury functions, not those of a judge'"); *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 389 (1996) (credibility determinations "are the jury's forte"); *Taylor* v. *Illinois*, 484 U.S. 400, 430 n.5 (1988) (discussing the jury's "central function of assessing the credibility of witnesses"). This core ability is particularly critical in drug quantity cases: because "the use of informers, accessories, accomplices, [and] false friends . . . may raise serious questions of credibility," defendants like Clark should be "entitled to broad latitude to probe credibility by cross-examination and to have the issue[] submitted to the jury with careful instructions." *On Lee* v. *United States*, 343 U.S. 747, 757 (1952).

Avoiding the false distinction between mandatory minimums and maximums that five Justices have recognized as indefensible allows juries to do what they do best. By requiring drug quantity to be

proven beyond a reasonable doubt, the rule not only satisfies the constitutional guarantee of the right to a jury trial, but assigns the key task of finding drug quantity to the institution best suited to make that determination. It does so while applying an essential protection of the criminal justice system to a critical aspect of the criminal process. The Seventh Circuit's rule is to the contrary, and it should not stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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